No. 76-1791

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM LEONARD KAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 545 F.2d 491.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 17, 1977. A petition for rehearing was denied on May 17, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on June 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury, defining the term "fraudulently obtained" in 15 U.S.C.

1644, rendered the statute unconstitutionally vague or overbroad.

2. Whether, in the circumstances of this case, petitioner was unconstitutionally subjected to criminal penalties merely for nonpayment of a debt.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of using a fraudulently obtained credit card to obtain goods and services having an aggregate retail value in excess of $5,000, in violation of 15 U.S.C. 1644. He was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. The evidence at trial showed that in February 1971 petitioner filed an application for a credit card with Diner's Club, Inc., in which he stated, *inter alia*, that he was the "owner" of New Era Printing, Inc. (although in fact he owned only an undivided half interest in that business), that his annual income was between $10,000 and $13,000, and that he had additional income of $3,000 from interest and stock investments (Tr. 30-31, 211). Petitioner signed the application below a paragraph which stated in part that "[e]ach cardholder * * * agrees to be responsible for all charges" made on his card (Tr. 32).

From April through December 1971, petitioner's monthly statements for use of his Diner's Club card reflected minimal charges, which were regularly paid (Tr. 36-38). In December 1971, however, petitioner used the card to finance a trip to Hawaii for himself and a companion (Tr. 234-237). In addition, during the next several months petitioner charged substantial other expenses on his Diner's Club card, for which he did not pay. His March 1972

statement showed an outstanding balance due of $19,248.46, with some $14,250 representing charges for airline tickets (Tr. 39-41).[1] As a result, petitioner's credit card was recalled and picked up during an attempted use (Tr. 44-45). Shortly thereafter, petitioner (who was then using an alias) was located by a creditor and was informed that several persons had been searching for the rented car he was driving. Petitioner immediately responded: "[T]here is nothing wrong with the credit card I used to rent that car" (Tr. 287-288).[2]

2. In July 1972, petitioner applied to the American Oil Company for an American Torch Club membership account (Tr. 105-106). The application stated that petitioner's annual income exceeded $9,500, that he was employed by New Era Printing, Inc., and that his business address was 9877 Brockbank, Suite 130, Dallas, Texas (which actually was the address of an apartment leased to him) (Tr. 107-108, 240, 245, 250). Petitioner signed the application under paragraphs which stated that the "[b]uyer agrees to pay American" either the balance owed within 25 days or the balance plus a finance charge if not paid within 25 days (Tr. 104; G. Ex. B-2; Pet. App. 3a).

As had been his practice with the Diner's Club card, petitioner's charges on the American Torch Club card during the first few months after its receipt were insubstantial and were regularly paid (Tr. 111-114). In February and March 1973, however, petitioner charged $7,919.53 and $35,338.32, respectively, bringing the total unpaid balance to $43,951.31 (Tr. 114, 120, 147-149,

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[1]These charges formed the basis for count 1 of the indictment.

[2]Although this conversation did not relate to the credit cards alleged to have been fraudulently obtained, the evidence was admitted to show petitioner's criminal intent and state of mind at the time of the events alleged in count 1 (Tr. 289).

152-153).[3] During at least part of this period of time, petitioner gambled substantial sums of money in Las Vegas, Nevada (Tr. 261, 266, 276-282).

3. Petitioner introduced evidence that, prior to 1971, he had obtained and repaid a number of bank loans (Tr. 313-343). Moreover, the defense established that the Diner's Club card would have been issued even if petitioner had disclosed that he was not the sole owner of New Era Printing (Tr. 364) and that he probably would have received the American Torch Club card even if his application had correctly identified the Brockbank address as that of his residence, rather than his business location (Tr. 374). The government contended, however, and the jury evidently found, that petitioner misstated his intention to pay for all charges incurred through use of his credit cards at the time he applied for the cards (Pet. App. 3a).

ARGUMENT

1. The district court instructed the jury as follows (Ch. 2)[4]:

> A credit card is fraudulently obtained if the statement or representation made to the issuing company in order to acquire the credit card at issue is wilfully made and known to be untrue, or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.
>
> A credit card may be fraudulently obtained by statements of half truths, or the concealment of material facts, as well as by affirmative statements or acts. A fact is material if it is a fact that a reasonably

[3]These charges formed the basis for count 2.

[4]"Ch." refers to the transcript of the court's charge to the jury, a copy of which is being lodged with the Clerk of this Court.

> prudent credit company would require before issuing a credit card.

Petitioner contends (Pet. 8-16) that these instructions unconstitutionally broadened the reach of the statute and also rendered it impermissibly vague (Pet. 8-16).[5] This argument, however, ignores the settled rule that the validity of jury instructions cannot be considered in isolation but must be tested "in the context of the entire record of the *trial*." *United States* v. *Park*, 421 U.S. 658, 674-675, quoting from *United States* v. *Birnbaum*, 373 F. 2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837 (emphasis in original). Viewed in this manner, the district court's instructions to the jury did not deprive petitioner of a fair trial.

The record indicates that the only material representations[6] at issue in this case were petitioner's statements in the applications for both credit cards that he would pay for any charges incurred. Thus, representatives of the defrauded corporations testified at trial that the minor misrepresentations in each application concerning petitioner's

[5]Petitioner also appears to suggest (Pet. 11) that Section 1644 is unconstitutionally vague on its face because it fails to define "fraudulently obtained." However, the term clearly means "conscious wrongdoing, an intention to cheat or be dishonest" (*United States* v. *Wunderlich*, 342 U.S. 98, 100) and is a universally understood concept. See *Weiss* v. *United States*, 122 F. 2d 675, 681 (C.A. 5), certiorari denied, 314 U.S. 687 ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.")

[6]A representation of fact is material if it has the natural tendency to influence, or is capable of influencing, the decision of one to whom it is directed (see *United States* v. *Krause*, 507 F. 2d 113, 118 (C.A. 5); *United States* v. *Paoli*, 505 F. 2d 971, 973 (C.A. 4); *United States* v. *Devitt*, 499 F. 2d 135, 139 (C.A. 7), certiorari denied, 421 U.S. 975), with the person to whom it is directed judged by a standard of ordinary prudence. *United States* v. *Mandel*, 415 F. Supp. 997, 1006 (D. Md.).

ownership interest in New Era Printing or his business address could not have affected their decision whether to issue a credit card to petitioner, and at no time did the government contend that petitioner had committed the alleged offense by failing to reveal an important fact. To the contrary, as the court of appeals noted (Pet. App. 3a-4a), the "Government's theory * * * was that [petitioner] misstated his intention to pay for the charges at the time he applied for the cards" and that Diner's Club and American Oil Company "would not have issued the cards had they known of [petitioner's] intent not to pay * * *." See, *e.g.*, Tr. 383.

Hence, the ultimate issue for the jury to decide was the fact-bound and narrow question of petitioner's intent regarding payment when he applied for the credit cards, a matter that unquestionably was material. There was no reason for the jury to speculate "as to what facts a 'reasonably prudent' credit company would want to know before issuing a credit card" (Pet. 11); indeed, the jury was expressly admonished not to engage in such speculation by the trial judge's further instruction that it should "not mention nor refer to, nor take into consideration any matter, fact, or circumstances, other than the testimony and evidence that has been admitted before you, all of which I instruct you particularly to observe and obey" (Ch. 9). At bottom, therefore, this case involves not the constitutional issue petitioner suggests but rather the unexceptional situation where two credit card companies "requested a representation as to [petitioner's] intention to pay the charges incurred [by use of their cards], and the

jury found this intention to have been misrepresented" (Pet. App. 4a).[7]

2. Petitioner contends (Pet. 16-20), however, that if the court of appeals' conclusions concerning the breadth of Section 1644 and the validity of the district court's jury instructions are accepted, it would result in his being convicted merely for failure to pay his debts, in violation of the Thirteenth Amendment and the Due Process Clause of the Fifth Amendment. This claim is belied by the record, which indicates that petitioner was found guilty on the basis of far more than mere nonpayment of debts.

Not only did the evidence show that on each credit card application petitioner made minor misrepresentations about his income, ownership of New Era Printing, or business address, but also there was "a remarkable similarity in the pattern on both cards of charging nominal amounts for several months and then suddenly and grossly abusing the credit extended to him" by expending extremely large sums of money on travel and gambling (Pet. App. 5a). As the court of appeals correctly held, in these circumstances there was sufficient evidence from which the jury could reasonably have inferred that from the outset petitioner never intended to comply with the terms of the credit agreement; hence, he was not convicted for a failure at some later time to meet his financial obligations, but

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[7] *Bouie* v. *City of Columbia*, 378 U.S. 347, cited by petitioner (Pet. 12), is distinguishable. In that case the Court held that the Due Process Clause prohibited a conviction based upon an unforeseeable judicial enlargement of a criminal statute. See *Marks* v. *United States*, No. 75-708, decided March 1, 1977, slip op. 4. There can be no question, however, that the conduct alleged and proven by the government in this case—use of a credit card procured by the false representation that petitioner intended to pay the charges incurred—falls within the obvious scope of Section 1644.

rather for fraudulent misrepresentations in the initial procurement of the cards.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

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[8] *Bailey* v. *Alabama*, 219 U.S. 219, and *Taylor* v. *Georgia*, 315 U.S. 25, upon which petitioner relies (Pet. 18-19), are therefore inapposite. In those cases, the Court reversed convictions for breach of employment contracts on which money had been advanced, where the only proof of fraud was that the contracts had been breached. In each case, the convictions were based on statutes providing that the subsequent failure to perform was *prima facie* evidence of fraudulent intent *ab initio*, and the juries were so instructed. In this case the government relied not on such a presumption but rather on circumstantial evidence of fraudulent intent at the time petitioner applied for the credit cards. Furthermore, unlike in *Bailey* and *Taylor*, petitioner was not forced to perform an employment contract on pain of criminal prosecution and hence could not have been subjected to involuntary servitude in violation of the Thirteenth Amendment and federal statutes.